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CASE No. 94-1421

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

ERNEST D. SUGGS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

PETITIONER'S REPLY BRIEF

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The arguments raised in Respondent's Brief in Opposition are contrary to this Court's clear Fourth Amendment precedent. As such, the arguments fail to demonstrate why the Petition for Writ of Certiorari should not be granted. This Reply Brief addresses Respondent's arguments under points I, II and IV of the Petition.

I. THERE WAS AN ILLEGAL ARREST BASED ON THIS COURT'S PRECEDENT OF DUNAWAY V. NEW YORK, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979), AND FLORIDA V. ROYER, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983), WHEN THE PETITIONER WAS TRANSPORTED TO A POLICE SUBSTATION WITHOUT PROBABLE CAUSE AFTER BEING STOPPED AND QUESTIONED BY POLICE OFFICERS.

Respondent's Brief in Opposition[1] to the Petition for Writ of Certiorari conclusively demonstrates that the Florida Supreme Court failed to apply this Court's Fourth Amendment precedent to the facts of this case. There are no "unique facts of this case" as argued by the State. (RBIO-7). The evidence is clear that Petitioner was illegally arrested and that his consents to search were only signed after a prolonged stationhouse detention. It is important to note that Respondent does not argue that probable cause existed at any point in time during the detention. Thus, this Court is squarely faced with a situation where an individual was stopped by the police and transported to the stationhouse for questioning without probable cause, a procedure that this Court has repeatedly condemned. *See* Dunaway v. New York, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 8 (1979), and Florida v. Royer, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983).

Before this Court, the State argues that Petitioner's initial stop was justified because either 1) he was speeding; or 2) there was evidence that he was involved in the disappearance of Pauline Casey.

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[1]References to the Respondent's Brief in Opposition to Petition for Writ of Certiorari will be made by the designation (RBIO-page number).

A. Stop Justified-Petitioner was Speeding.

While there is some evidence in the record that Petitioner may have been exceeding the speed limit when he was first observed by Officer Townsend, it is equally clear that the stop was not initiated until *after* Townsend confirmed that the description of the vehicle was consistent with the BOLO that had been issued. (R-854-55). When presented with the compelling evidence of what occurred subsequent to the stop, it becomes abundantly clear that Petitioner was not detained for a violation of the traffic laws of the State of Florida. If this were *in fact* a traffic stop, then why did Officer Townsend not write Petitioner a ticket for speeding? More importantly, why did Townsend need six back-up police officers and four police units to converge on the scene within minutes of the stop.[2] Obviously, Petitioner was not detained for a violation of the traffic laws and, even if he were, he could not be taken into custody for such a violation because it is noncriminal. *See* Section 318.14(2), Florida Statutes (1993).

B. Stop Justified on "Reasonable Suspicion."

Respondent next argues that Petitioner could be detained because the police had a "reasonable suspicion" that he was involved in the disappearance of Pauline Casey.

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[2]The Florida Supreme Court has addressed a similar question and held that "when a person is charged with violating a municipal ordinance regulating conduct that is non-criminal in nature, such as in the traffic control area, section 901.15(1) only permits a person to be detained for the limited purpose of issuing a ticket, summons, or notice to appear. *A full custodial arrest in such situations is unreasonable and a violation of the Fourth Amendment and article I, section 12 of the Florida Constitution.*" Thomas v. State, 614 So.2d 468 (Fla. 1993) *(emphasis added)*.

(RBIO-8). The evidence in the record is to the contrary. The police repeatedly testified in the hearing before the trial court that there was no basis to arrest Petitioner (R-876) and that they did not even know that a crime had been committed: "We had no knowledge of any foul play at that point." (R-889). The only evidence that the police had that arguably connected Petitioner to the Teddy Bear Bar was the statement of Ray Hamilton. Hamilton told police that, when he left the Teddy Bear Bar, Pauline Casey was playing pool with a person he described in general terms who was driving a vehicle similar in description to the one being driven by Petitioner. (R-871, 874). Hamilton, however, provided no tag number or other identifying information to police and Hamilton was never called to the scene of the stop to identify Petitioner or his vehicle. Simply put, the police did nothing at the scene of the stop to confirm or dispel their suspicions. Moreover, it is clear that Hamilton left the bar at 9:45 p.m. and that it was not until 11:10 p.m. that Casey was presumed missing, an hour and twenty-five minutes later. (R-2796-98). The police had no information of what occurred in the interim. Therefore, it is questionable whether Hamilton's statement was a sufficient basis to even stop Petitioner's vehicle.

More importantly, even if there existed a "reasonable suspicion," this is insufficient to justify the police transporting an accused to the stationhouse for further questioning. This Court's clear precedent firmly establishes that the accused can only be questioned at the scene of the stop. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); and United States v. Brignoni-Ponce, 422 U.S. 873, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975). Here, the police attempted to confirm their suspicions by conditions that approached arrest, a procedure that has been uniformly condemned by this Court as well as lower federal courts. Dunaway & Royer *supra*. *See also* United States v. Martinez, 808 F.2d 1050,

1055 (5th Cir. 1987); United States v. Richardson, 949 F.2d 1416, 1420 (6th Cir. 1991); and United States v. Novak, 870 F.2d 1345, 1350-53 (7th Cir. 1989). Indeed, for all practical purposes, Petitioner was *arrested* at a point in time when there was no evidence that a crime had been committed.

C. The "Unique Facts" of This Case.

Respondent further argues that the facts of this case are "unique" because here Petitioner voluntarily agreed to go to the stationhouse. However, this "voluntary agreement" actually consisted of the police telling Petitioner that they intended to transport him to the station and then asking him if he had any "objections." (R-887). Likewise, Petitioner's vehicle was driven to the station by one of the officers because Petitioner "had no objections for Lieutenant Mann to drive the vehicle in." (R-887). These officers conceded that Petitioner was never told that he was free to leave or given any options other than to go with the officers and to permit them to transport his vehicle. (R-886, 890 & 920). The self serving testimony from the police officers that this was a "voluntary trip" by Petitioner is overwhelmed by the evidence that: (1) After being converged on by a huge police presence, Petitioner's car keys, title and driver's license were taken from him (R-856, 857 & 890); (2) Six police officers in four cars were present at the scene of the stop; (3) Petitioner was transported to the police station securely enclosed in the back of a police car (R-888); and (4) The officers refused to tell him why they were taking him to the police station and would only reveal that they wanted to talk to him "about an incident that occurred in Walton County" (R-872, 885, 897 & 919). During the hearing, the officers *never* explained why they did not question Petitioner about his involvement in the disappearance of the bar maid *right there at the scene of the stop*. These actions by the police clearly demonstrate that Petitioner was transported to the police station, a coercive

atmosphere, where he could be questioned for hours until he ultimately confessed or provided other evidence of his guilt, such as a consent to search. Petitioner was repeatedly accused of involvement in the girl's disappearance while he steadfastly denied knowing anything about it. (R-900-01). When the police did not produce a confession of Petitioner's guilt, the police next insisted that Petitioner permit them to search his car and home so he could "eliminate" himself from their accusations. (R-922). When Petitioner did not immediately accede to their demands for permission to search, the police "negotiated" for that consent and ultimately agreed not to charge Petitioner if firearms were found in his home. This is the first case (to Petitioner's knowledge) where the police were allowed to negotiate their way around an obvious violation of the Fourth Amendment! This Court certainly should not countenance or otherwise sanction this type of illegal police conduct.

Respondent attempts to distinguish Dunaway and Royer because Petitioner was "free to leave" whereas Dunaway and Royer were not. The only evidence that Petitioner was free to leave is the conclusory, uncorroborated, after-the-fact testimony of the police officers that they would have allowed Petitioner to leave. The evidence clearly reflects that the officers *never* told Petitioner that he was free to go (R-886 & 890). The other actions of the officers, especially taking Petitioner into custody and not returning his car keys, driver's license, and car title would convey to any reasonable person that he was *not* free to leave. This is precisely why this Court should grant this Petition: the police were permitted to justify Petitioner's prolonged detention on the basis that he was free to leave, when no reasonable person in Petitioner's position would have concluded that he could simply drive away. It is absurd to permit the police to use their own subjective test to determine when a person is free to leave, especially when the

circumstances demonstrate otherwise. This Court should grant the writ and clarify that the police must inform a suspect that he is free to leave, if the police intend to rely upon that fact to justify a prolonged detention.

Respondent also suggests that Dunaway and Royer can be distinguished because the police never received an agreement from Dunaway or Royer to accompany them. This issue was never addressed in either Dunaway or Royer, but it is clear from a reading of both cases, that Dunaway and Royer agreed to go with the officers. For example, in Royer this Court noted that "the detectives did not return his airline ticket and identification but asked Royer to accompany them to a room, approximately 40 feet away, adjacent to the concourse." Royer, 460 U.S. at 494, 75 L.Ed.2d at 234. Thus, Royer suffered the same fate as Petitioner. Royer's plane ticket and identification were not returned, just as Petitioner's car keys, title and driver's license were not returned. Royer was asked to accompany the officers to a room 40 feet away and Petitioner was asked if he had any "objections" to going to the station several miles away. At a minimum, Petitioner stands in the same position as Royer and should not have been transported from the scene of his encounter with the police. When the other facts are taken into consideration, it is clear that the police conduct here is even more egregious than that in Royer.

II. THE CONSENTS TO SEARCH GIVEN BY THE PETITIONER AFTER BEING TRANSPORTED TO THE POLICE SUBSTATION WERE THE PRODUCT OF PETITIONER'S ILLEGAL ARREST.

Petitioner recognizes that generally, this Court applies a "totality of the circumstances" test in determining the voluntariness of a consent to search. Schneckloth v. Bustamonte, 412 U.S. 218, 222, 93 S. Ct. 2036, 2051, 36 L.

Ed. 2d 857 (1973). It is equally clear, however, that if the consent to search is a product of illegal police conduct, then the evidence seized should be suppressed. *See* Royer *supra;* United States v. Garnier, LEXIS 17334 (6th Cir. 1994); United States v. McSwain, 29 F.3d 558, 560 (10th Cir. 1994); United States v. Sandoval, 29 F.3d 537 (10th Cir. 1994); United States v. Chavez-Villarreal, 3 F. 3d 124 (5th Cir. 1993); United States v. McCraw, 920 F. 2d 224 (4th Cir. 1990); and United States v. Maragh, 894 F. 2d 415 (D.C. Cir. 1990). The burden is on the prosecution to show a break in the chain of illegality. *See* Brown v. Illinois, 422 U.S. 590, 95 S. Ct. 2674, 45 L. Ed. 2d 705 (1975). In the case at bar, there is a clear chain of events from Petitioner's illegal arrest to the execution of the consents to search that make the resulting searches a product of the illegal police conduct. Respondent argues that "it is questionable" whether this issue was preserved below. (RBIO-12). The issue was preserved and argued to the trial court by Petitioner's counsel:

> And our contention is that everything that came as a result of that, we believe it to be an illegal detention and we believe that *everything that came as a result of that* should be suppressed. (R-943).
>
> * * *
>
> Was the person -- how long a period of time was the person in custody? Was he being questioned continuously during that period of time? Is there *a break in there* whereby the person may then have time to think about it or possibly get other advice or to consider, . . . [a]nd I think, as a matter of fact, the testimony here has shown that *there was no such time for reflection*, that the signing of the so-called consent forms came as a *direct result of a*

> *continuous questioning* during an illegal interrogation. (R-947-48).
>
> * * *
>
> In the affidavit, very clearly, it states that probable cause. Those were a *direct result* of the earlier so-called consent. (R-939).

(emphasis added).

The evidence in this case reflects that Petitioner's consents to search were the product of illegal police conduct. Respondent has failed to distinguish this Court's controlling precedent or otherwise justify the Fourth Amendment violation. This Court should grant the writ and apply Dunaway and Royer *supra*, to the facts of this case.

IV. IT IS NOT SUFFICIENT FOR POLICE OFFICERS TO REMAIN QUIET AND NOT INFORM A SUSPECT OF THE RIGHT TO LEAVE IN ORDER TO UNDERMINE THIS COURT'S PRECEDENT ENUNCIATED IN DUNAWAY V. NEW YORK, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979), AND FLORIDA V. ROYER, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983).

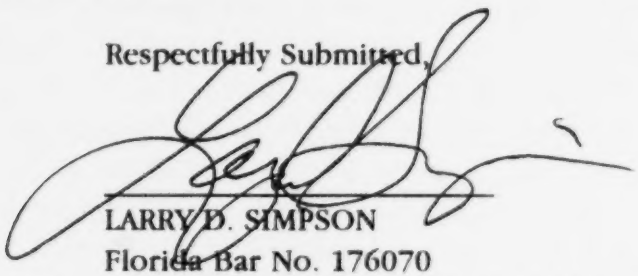
Respondent argues that "the voluntariness of a consent to search does not depend upon the subject having been informed of her right to decline to cooperate." (RBIO-14 *citing* United States v. Mendenhall, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)). Mendenhall, however, clearly supports Petitioner's argument because, unlike Royer, in Mendenhall the police returned Mendenhall's "airline ticket and driver's license to her . . . [and then] asked [Mendenhall] if she would accompany him to the airport DEA office for further questions." Mendenhall 446 U.S. at

548, 100 S. Ct. at 1874, 64 L. Ed. 2d at 505. Thus, Mendenhall's personal effects that would enable her to leave were returned. Conversely, if the police do not return these type of personal effects, at a minimum, the detainee should be informed of his right to terminate the police encounter.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,



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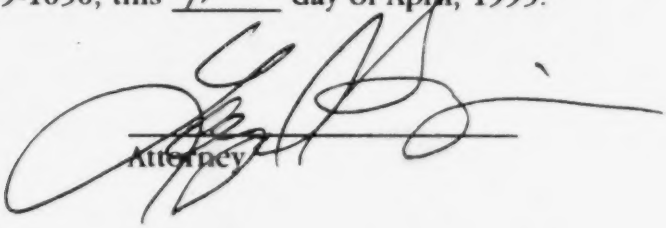
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Robert Butterworth, Attorney General; Richard B. Martell, Chief, Capital Appeals; and Curtis M. French, Assistant Attorney General, Office of Attorney General, The Capitol, Tallahassee, Florida 32399-1050, this 11th day of April, 1995.



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